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### Employment Discrimination—Title VII's Limited Preemptive Effect Allows State Laws Mandating Pregnancy Leave and Reinstatement

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**EMPLOYMENT DISCRIMINATION—TITLE VII'S LIMITED PRE-EMPTIVE EFFECT ALLOWS STATE LAWS MANDATING PREGNANCY LEAVE AND REINSTATEMENT.** *California Federal Savings and Loan Association v. Guerra*, 107 S. Ct. 683 (1987).

California Federal Savings and Loan Association (Cal Fed) permitted employees with at least three months of service to take unpaid leaves of absence for various reasons including pregnancy.<sup>1</sup> Cal Fed attempted to reinstate employees returning from unpaid leave into the employee's usual position or one similar, but Cal Fed expressly reserved the right to terminate the employee if such positions were unavailable. Having taken a pregnancy leave in January, 1982, Lillian Garland, a Cal Fed receptionist for several years, notified Cal Fed of her ability to return to work in April, 1982. Upon being informed that her job had been filled and that no similar positions were available, Garland complained to the California Department of Fair Employment and Housing, which issued an administrative accusation against Cal Fed on her behalf. The accusation charged Cal Fed with violating section 12945(b)(2) of California's Fair Employment and Housing Act.<sup>2</sup> That provision grants employees the right to return to the same or similar position if the maternity leave period does not exceed four months and a business necessity does not require filling the position earlier.

Cal Fed sought a declaration from the United States District Court for the Central District of California<sup>3</sup> that section 12945(b)(2) was inconsistent with and preempted by Title VII.<sup>4</sup> In addition Cal Fed sought an injunction against enforcement of the section. The district court granted Cal Fed's motion for summary judgment, holding that Title VII preempted the California statute. On appeal by the California Department of Fair Employment and Housing, the United States Court of Appeals for the Ninth Circuit reversed, holding that Title VII does not preempt a state law that guarantees pregnant women a certain number of pregnancy leave days, such law being neither inconsistent

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1. The term "pregnancy", as used throughout this note, includes pregnancy, childbirth, and related medical conditions.

2. CAL. GOV'T. CODE § 12945(b)(2) (West 1980).

3. *California Fed. Sav. & Loan Ass'n v. Guerra*, 34 Fair Empl. Prac. Cas. (BNA) 562 (C.D. Cal. 1984), *rev'd*, 758 F.2d 390 (9th Cir. 1985), *aff'd*, 107 S. Ct. 683 (1987).

4. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. § 2000e and other scattered sections) [hereinafter Title VII].

with, nor unlawful under, Title VII.<sup>5</sup> The United States Supreme Court granted certiorari and affirmed the court of appeals' decision. *California Federal Savings and Loan Association v. Guerra*, 107 S. Ct. 683 (1987).

Section 703(a)(1) of Title VII makes it an unlawful employment practice for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."<sup>6</sup> The 1964 Civil Rights Act's opponents had added sex as a prohibited basis of discrimination in the hopes of defeating the act's passage.<sup>7</sup> With the last minute addition of sex as a prohibited basis of employment discrimination, only limited evidence of congressional intent as to the meaning of sex discrimination exists. The Equal Employment Opportunity Commission (EEOC)<sup>8</sup> issued guidelines in 1972 stating that employment discrimination based on pregnancy violated Title VII's prohibition of sex discrimination.<sup>9</sup> Under those guidelines numerous courts found that employment policies and benefits with differences based on pregnancy violated Title VII.<sup>10</sup>

In the 1970s, pregnant workers began bringing discrimination suits alleging violations of their due process and equal protection rights.<sup>11</sup> Such claims required the workers to show that the employer had both a nexus to the state<sup>12</sup> and a discriminatory purpose behind the challenged

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5. *California Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390 (9th Cir. 1985), *aff'd*, 107 S. Ct. 683 (1987).

6. 42 U.S.C. § 2000e-2(a)(1) (1982).

7. 110 CONG. REC. 2577 (1964). On the bill's last day in the House Rules Committee, a motion to add sex as a basis of discrimination in Title VII was defeated. 20 CONG. QUARTERLY 344 (1964). The day before the act's passage on the House floor, Representative Howard Smith of Virginia proposed a sex discrimination amendment, which passed after two hours of discussion. 110 CONG. REC. 2577 (1964); 110 CONG. REC. 2720 (1964). In the Senate, sex discrimination received little discussion. Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 879-83 (1967).

8. Title VII is subtitled "Equal Employment Opportunities," and the federal enforcement agency is named the Equal Employment Opportunity Commission (EEOC). 42 U.S.C. § 2000e-4(a) (1982).

9. 29 C.F.R. § 1604.10 (1973). The EEOC guidelines declared that pregnancy constitutes a temporary disability for all job-related purposes. Hence, the EEOC guidelines required that pregnancy be treated the same as other temporary disabilities. *Id.*

10. *E.g.*, *Communications Workers of America v. American Tel. & Tel. Co.*, 513 F.2d 1024, 1030 (2d Cir. 1975), *vacated & remanded*, 429 U.S. 1033 (1977); *Satty v. Nashville Gasoline Co.*, 522 F.2d 850, 854 (6th Cir. 1975), *aff'd in part, vacated in part*, 434 U.S. 136 (1977); *Holthaus v. Compton & Sons, Inc.*, 514 F.2d 651, 653 (8th Cir. 1975).

11. See Wald, *Judicial Construction of the 1978 Pregnancy Discrimination Amendment to Title VII: Ignoring Congressional Intent*, 31 AM. U. L. REV. 591, 592-96 (1982).

12. See *Shelley v. Kraemer*, 334 U.S. 1 (1948) (fourteenth amendment does not prohibit

action.<sup>13</sup> In *Cleveland Board of Education v. LaFleur*,<sup>14</sup> decided in 1974, a pregnant worker successfully claimed that a school board's rule requiring a pregnant teacher to take at least eight months of unpaid leave, five months before delivery and three months after, violated an employee's due process rights. The Court reasoned that the school board's rule with arbitrary cut-off dates bore "no rational relationship to the valid state interest of preserving continuity of instruction."<sup>15</sup> The Court found that the cut-off dates amounted to a conclusive presumption that every pregnant teacher is physically incapable of teaching beyond the fifth or sixth month of pregnancy.<sup>16</sup> The Court noted that the Constitution requires individual determinations of pregnant employees' abilities to continue working.<sup>17</sup>

In *Geduldig v. Aiello*,<sup>18</sup> decided six months after *LaFleur*, the United States Supreme Court held that California's employee disability insurance plan, funded entirely from employee contributions, could exclude payments for normal pregnancy-related disabilities. The *Geduldig* decision rested upon the fourteenth amendment's equal protection clause rather than Title VII.<sup>19</sup> In the majority opinion, however, a footnote stated that classifications based on pregnancy are not necessarily sex-based classifications.<sup>20</sup> Several inferior courts subsequently held *Geduldig* inapplicable to pregnancy discrimination actions arising

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private conduct, however discriminatory or wrongful; state action is required).

13. See *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979) (purposeful discrimination is the condition offensive to the Constitution).

14. 414 U.S. 632 (1974).

15. *Id.* at 643.

16. *Id.* at 644. Since *Weinberger v. Salfi*, 422 U.S. 749 (1975), the irrebutable presumption doctrine has not been used by the Supreme Court.

17. 414 U.S. at 645-46.

18. 417 U.S. 484 (1974).

19. *Id.* The majority considered the exclusion an "under-inclusive" classification, which requires only a "rational relation test." An under-inclusive classification contains all similarly situated people but excludes some people who are similar to them in terms of the law's purpose. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 588 (2d ed. 1983). The "rational relation" test is the Court's lowest level of scrutiny in its equal protection analysis, and requires only that the legislative classification bear a rational relationship to a legitimate governmental interest. *Frontiero v. Richardson*, 411 U.S. 677 (1973). The level of scrutiny for gender-based classifications is that the state must show a close and substantial relationship to important governmental objectives. *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971). The strictest scrutiny level invalidates inherently suspect classifications, such as race, national origin and alienage, unless the state shows the class is necessary to further a compelling state interest. In *re Griffiths*, 413 U.S. 717 (1973).

20. 417 U.S. at 496 n.20. The footnote explained that distinctions based on pregnancy may not invidiously discriminate on the basis of sex, because classifications of the pregnant and non-pregnant include only women in the former but both sexes in the latter. *Id.*

under Title VII.<sup>21</sup>

Two years later the United States Supreme Court, in *General Electric Co. v. Gilbert*,<sup>22</sup> held that *Geduldig* did apply to actions brought under Title VII,<sup>23</sup> and that under Title VII employers could exclude pregnancy from comprehensive disability plans. General Electric's disability plan paid nonoccupational sickness and accident benefits, but excluded pregnancy disabilities from coverage. A class action on behalf of female employees sought a declaration that the exclusion violated Title VII.<sup>24</sup> The Court in *Gilbert* applied a disparate impact analysis<sup>25</sup> in holding that, absent evidence that the exclusion was a pretext for gender-based discrimination, disability plans excluding preg-

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21. *E.g.*, *Satty v. Nashville Gas Co.*, 522 F.2d 850, 853-54 (6th Cir. 1975) (*Geduldig* not a talisman for Title VII actions), *aff'd in part, vacated in part*, 434 U.S. 136 (1977); *Gilbert v. General Elec. Co.*, 519 F.2d 661, 666-67 (4th Cir. 1975) (*Geduldig* inapplicable to Title VII actions), *rev'd and remanded*, 429 U.S. 125 (1976); *Hutchison v. Lake Oswego School Dist. No. 7*, 519 F.2d 961, 964 (9th Cir. 1975) (Title VII language was conducive to interpretations different from those based upon the equal protection clause), *vacated and remanded*, 429 U.S. 1033 (1977); *Tyler v. Vickery*, 517 F.2d 1089, 1098-99 (5th Cir. 1975) (constitutionality of Georgia bar exam not measurable by Title VII standards); *Communications Workers of America v. American Tel. & Tel. Co.*, 513 F.2d 1024, 1030-31 (2d Cir. 1975) (statutory construction rather than constitutional analysis is at issue), *vacated and remanded*, 429 U.S. 1033 (1977); *Wetzel v. Liberty Mutual Ins. Co.*, 511 F.2d 199, 203-04 (3d Cir. 1975) (actions under Title VII require statutory interpretation rather than constitutional analysis), *vacated and remanded*, 424 U.S. 737 (1976). *See also* B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 384 (2d ed. 1983).

22. 429 U.S. 125 (1976).

23. *Id.* at 136. *LaFleur* and *Geduldig*, resting on constitutional grounds, provided no protection to private sector pregnant workers since the requisite state action was lacking. Title VII contains no state action requirement and provides a cause of action without a showing of discriminatory intent. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

24. 429 U.S. at 128. The United States Supreme Court reversed both the district court and court of appeals decisions, which held that General Electric's disability plan excluding pregnancy benefits violated Title VII. *See Gilbert v. General Electric Co.*, 375 F. Supp. 367 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir. 1975).

25. Disparate impact analysis applies when a facially neutral employment policy has a disproportionate impact on Title VII's protected groups. The affirmative defense of business necessity counters the prima facie disparate impact case. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In contrast, facial discrimination, in which the policy explicitly discriminates, is countered only by a bona fide occupational qualification (BFOQ). Only when the employer can show that the excluded class is unable to perform essential job duties is the BFOQ defense available. Courts can also apply a pretext theory when an employee alleges that a facially neutral policy is a mere pretext for discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). An employer may articulate a legitimate nondiscriminatory reason to rebut an employee's prima facie case of discrimination, shifting the burden to the employee to show that the employer's nondiscriminatory reason is a pretext for discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Both facial discrimination and pretext cases are called "disparate treatment" cases. *See Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1547 (11th Cir. 1984) (citing *Williams, Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection With Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641, 673-82 (1981)).

nancy from coverage did not constitute gender-based discrimination.<sup>26</sup> The Court recognized that a prima facie violation of Title VII occurs "upon proof that the effect of an otherwise facially neutral plan or classification is to discriminate against members of one class or another."<sup>27</sup> Finding that the women had failed to show the requisite gender-based effects, the Court characterized the plan as merely "an insurance package, which covers some risks, but excludes others . . . ."<sup>28</sup> The Court stressed that differentiating between the pregnant and the nonpregnant was not sex discrimination, because the nonpregnant category includes both men and women.<sup>29</sup> Therefore, no violation of Title VII occurred under the Court's disparate impact analysis. The *Gilbert* majority also discounted the EEOC Guidelines in its decision, since they were not a contemporaneous interpretation of Title VII<sup>30</sup> and conflicted with prior EEOC rulings.<sup>31</sup>

One year after *Gilbert*, the Supreme Court held that a policy of denying accumulated seniority to female employees returning from pregnancy leave violates Title VII.<sup>32</sup> In *Nashville Gas Co. v. Satty*<sup>33</sup> the Court distinguished forfeiture of seniority from the practice of excluding pregnancy from disability plans.<sup>34</sup> In the absence of evidence of the exclusion's discriminatory effect, the *Satty* court held that the failure to include pregnancy in a disability plan was merely a failure to extend to women a benefit that men could not and did not receive.<sup>35</sup>

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26. 429 U.S. at 136. The dissenting justices strongly opposed applying *Geduldig* to *Gilbert*'s Title VII issue. (Brennan, J., dissenting, joined by Marshall, J.; Stevens, J.). Most courts since *Gilbert* have found that a pregnancy classification does not constitute a pretext to discrimination against women. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 384 n.119 (2d ed. 1983) (citing *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361 (4th Cir. 1980); *Condit v. United Air Lines, Inc.*, 631 F.2d 1136 (4th Cir. 1980); and *In re National Airlines, Inc.*, 434 F. Supp. 249 (S.D. Fla. 1977)).

27. 429 U.S. at 137.

28. *Id.* at 138.

29. *Id.* at 133-40.

30. *Id.* at 135-36, 141-42. Justice Brennan, joined by Justice Marshall, found the guidelines, "a particularly conscientious and reasonable product of EEOC deliberations," thus warranting great deference. *Id.* at 157 (Brennan, J., dissenting, joined by Marshall, J.).

31. *Id.* at 140-45.

32. *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). At issue was a company policy requiring pregnancy leave, but filling open positions and placing returning employees in temporary positions. Even if the employee regained a permanent position, her seniority was lost except for pension and vacation purposes. The Court found this policy facially neutral. *Id.* at 140.

33. 434 U.S. 136 (1977).

34. The Court explained that Title VII does not "permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role." *Id.* at 142 (citations omitted).

35. *Id.* at 144-45. The Court reiterated that a facially neutral plan, suffering from underin-

The Court reasoned, however, that in cases where seniority was forfeited, women were not simply denied a benefit, but were burdened in a manner from which men were immune.<sup>36</sup> Other inferior court decisions since *Satty* have applied this benefit/burden analysis.<sup>37</sup>

Responding to the Supreme Court's decisions,<sup>38</sup> Congress passed the Pregnancy Discrimination Act of 1978 (PDA),<sup>39</sup> which amended Title VII to include pregnancy classifications within the definition of sex discrimination.<sup>40</sup> The legislators specifically endorsed the opinions of the dissenting justices in *Gilbert*<sup>41</sup> who had argued that the underinclusive disability programs differentiated not between the pregnant and the nonpregnant, but between those who faced the risk of pregnancy and those who did not.<sup>42</sup> Senator Williams, a PDA co-author, stated that the *Gilbert* majority "ignored the congressional intent in enacting Title VII of the Civil Rights Act—that intent was to protect all indi-

clusiveness, puts upon the plaintiff the burden of proving discrimination on the basis of sex in violation of Title VII. *Id.* Recognizing that such a burden is met by proof of discriminatory effect, the Court declined to decide whether intent must be proven to establish a Title VII violation. *Id.*

36. *Id.* at 142. In so holding the Court relied upon the 1972 EEOC guidelines previously discounted in *Gilbert*, saying that the guideline applicable to seniority was enacted more contemporaneously with the Act and conflicted less with prior EEOC rulings than did the guidelines considered in *Gilbert*. *Id.*

37. *E.g.*, *Mitchell v. Board of Trustees*, 599 F.2d 582 (4th Cir. 1979), *cert. denied*, 444 U.S. 965 (1979).

38. H.R. REP. NO. 948, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4751-52.

39. The Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1977) (codified at 42 U.S.C. § 2000e(k) (1982)) [hereinafter PDA].

40. The PDA provides:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy . . . and women affected by pregnancy . . . shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e2(h) of this title shall be interpreted to permit otherwise.

42 U.S.C. § 2000e(k) (1982). An employer maintaining a policy that adversely impacts on or disparately treats pregnant employees violates Title VII unless a business necessity or bona fide occupational qualification can be established. SCHLEI & GROSSMAN, *supra* note 10, at 388-89 (citing *Harris v. Pan American World Airways, Inc.*, 649 F.2d 670, 24 Fair Empl. Prac. Cas. (BNA) 947 (9th Cir. 1980)); *see supra* note 24.

41. S. REP. NO. 331, 95th Cong., 1st Sess. (1977); H.R. REP. NO. 948, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4750. *See* *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976). "A realistic understanding of conditions found in today's labor environment warrants taking pregnancy into account in fashioning disability policies." 429 U.S. at 159 (Brennan, J., dissenting).

42. HOUSE REPORT, *supra* note 37, at 2, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 4752; *Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 1 *passim* (1977).

viduals from unjust employment discrimination, including pregnant workers.”<sup>43</sup> A House committee report on the PDA stated that the *Gilbert* majority opinion “erode[s] our national policy of nondiscrimination in employment . . . [The PDA] unmistakably reaffirms that sex discrimination includes discrimination based on pregnancy . . . .”<sup>44</sup> With the passage of the PDA, the EEOC adopted new guidelines in 1979 nearly identical to the earlier ones.<sup>45</sup>

The PDA itself provides no substantive rules to govern pregnancy discrimination claims. Inserted in Title VII’s definitional provisions, the PDA finds substantive form through the sections enumerating the proscribed employment practices under the title.<sup>46</sup> The PDA confirms that pregnant women are entitled to the same disability benefits as men; however, under the PDA, employers not providing temporary disability benefits to any workers do not have to begin providing disability benefits to pregnant workers.<sup>47</sup> The PDA lacked retroactive effect, so cases arising before the amendment must still be analyzed under the *Gilbert*<sup>48</sup> and *Satty*<sup>49</sup> benefit and burden analysis.<sup>50</sup>

In the 1983 case of *Newport News Shipbuilding & Dry Dock Co.*

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43. 123 CONG. REC. 7539 (1977) (statement of Sen. Williams introducing the bill), *reprinted in* STAFF OF SENATE COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978 2 (1979).

44. H.R. REP. NO. 948, 95th Cong., 2d Sess. 3 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4749.

45. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604 (1986). The EEOC guidelines on employment policies relating to pregnancy and childbirth, 29 C.F.R. § 1604.10 (1986), provide in part that a *prima facie* violation of Title VII occurs when a written or unwritten employment policy or practice excludes applicants because of pregnancy. Furthermore, pregnancy must be treated the same as disabilities caused by any other medical condition under an employer’s health or disability insurance or sick leave plans. Other employment practices involving leave duration, seniority, and reinstatement must apply to pregnancy on the same terms as applied to other disabilities. 29 C.F.R. § 1604.10(c) (1986) provides that a violation of the act occurs when under an employment policy a pregnant worker is terminated and such termination disparately impacts on one sex and no business justification exists. All fringe benefit programs implemented after October 31, 1978 must treat pregnancy the same as other disabilities.

46. 42 U.S.C. §§ 2000e-2(a)(1) & (2) (1982).

47. *See, e.g.*, HOUSE REPORT, *supra* note 37, at 4, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 4749.

48. 429 U.S. 125 (1976).

49. 434 U.S. 136 (1977).

50. *E.g.*, *Allen v. County of Montgomery, Ala.*, 788 F.2d 1485 (11th Cir. 1986); *Zuniga v. Kleberg County Hosp.*, 692 F.2d 986 (5th Cir. 1982); *Langley v. State Farm Fire & Cas. Co.*, 644 F.2d 1124 (5th Cir. 1981). Some inferior courts have used the PDA, contrary to its legislative intent, to reach pre-*Gilbert* conclusions regarding the legality of practices relating to pregnancy. *See, e.g.*, *Somers v. Aldine Independent School Dist.*, 464 F. Supp. 900 (S.D. Tex. 1979), *aff’d mem.*, 620 F.2d 298 (5th Cir. 1980).



v. EEOC,<sup>51</sup> the Supreme Court held that the PDA provides protection not only for women employees but also for the spouses of male employees. Rejecting the employer's contention that the PDA protects only employees and not spouses of employees,<sup>52</sup> the Court reasoned that an employer's health benefit plan which provides more extensive pregnancy coverage to female employees than to male employees' spouses violates Title VII.<sup>53</sup> Such plans give married male employees a benefit package for their dependents that is less inclusive than the dependency coverage provided to married female employees.

In 1987, *California Federal Savings and Loan Association v. Guerra*,<sup>54</sup> presented the United States Supreme Court with the issue of whether Title VII, as amended by the PDA, preempts<sup>55</sup> a California statute<sup>56</sup> that requires employers to provide leave and reinstatement to

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51. 462 U.S. 669 (1983).

52. Several federal courts had held that the PDA applied only to women employees, not employees' spouses; e.g., *EEOC v. Joslyn Mfg. & Supply Co.*, 524 F. Supp. 1141 (N.D. Ill. 1981), *aff'd*, 706 F.2d 1469 (7th Cir. 1983).

53. 462 U.S. at 676. *See generally* Note, *Equality in the Workplace: Is That Enough for Pregnant Workers?*, 23 J. FAM. L. 401 (1984).

54. 107 S. Ct. 683 (1987).

55. The preemption doctrine derives from the supremacy clause of the United States Constitution. U.S. CONST. art. VI, sec. 2. *See* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Preemption occurs when a state law obstructs "the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). When the state law operates within the state's traditional police power, the federal law preempts the state law only if Congress's clear and manifest purpose to do so appears. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). Both the state and federal regulations must be interpreted so as to accomplish their purposes. *United Steelworkers of America v. Weber*, 443 U.S. 193, 201-02 (1979); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977) (stating that preemption analysis demands an examination of the regulations as they are interpreted and applied, not merely as they are written). *See also* Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959) (discussing how decisions based on preemption allow the court to avoid reaching troublesome constitutional questions).

56. CAL. GOV'T. CODE § 12945(b)(2) (West 1980). California maintains a comprehensive statute prohibiting employment and housing discrimination, the California Fair Employment and Housing Act (FEHA), CAL. GOV'T. CODE §§ 12900-12996 (West 1980). The section at issue in *Guerra* makes it an unlawful employment practice for an employer to not provide reasonable pregnancy leave to pregnant workers, unless the employer's refusal is based upon a bona fide occupational qualification. The reasonable leave period, not exceeding four months, covers only the period of actual disability caused by pregnancy. CAL. GOV'T. CODE § 12945(b)(2) (West 1980). Only subsection (b)(2) applies to employers subject to Title VII, that is, employers of fifteen or more employees must comply with both laws. CAL. GOV'T. CODE § 12945(e) (West 1980). The California agency authorized to interpret the FEHA, the Fair Employment and Housing Commission, CAL. GOV'T. CODE §§ 12935(a)(1) and (h), construes § 12945(b)(2) as requiring California employers to reinstate an employee returning from such pregnancy leave to the position she previously held, unless the position is no longer available due to business necessity. If business necessity forecloses the position's availability, the employer must make a reasonable, good faith effort to place the employee in a substantially similar position. *Matter of the Accusation of the Dept. of*

pregnant employees. The Court began its analysis by stating that the determination of whether a federal law preempts a state statute involves solely the ascertainment of congressional intent.<sup>57</sup> The Court stated that federal law may preempt state law in three ways:<sup>58</sup> (1) Congress may expressly preempt state law;<sup>59</sup> (2) Congress may impliedly preempt state laws where the sufficiently comprehensive scheme of federal regulation leaves no room for supplementary state regulation (occupy the field);<sup>60</sup> and (3) an actual conflict with the federal law preempts the state law.<sup>61</sup>

The Court found that only the third preemptive ground was at issue in *Guerra*, as Congress had in two sections of the 1964 Civil Rights Act expressly disclaimed any intent to preempt state laws on, or occupy the field of, employment discrimination.<sup>62</sup> Rather, Congress had indicated that the Act preempts only those state laws which either require or permit employers to violate Title VII or are inconsistent with the Act's purpose.<sup>63</sup> The Court stated that these sections, severely limiting Title VII's preemptive effect,<sup>64</sup> reflect the importance Congress attached to state antidiscrimination laws in achieving Title VII's goal

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Fair Employment and Housing v. Travel Express, Case No. FEP80-81 A7-0992s N18709 83-17 (Aug. 4, 1983). See *Guerra*, 107 S. Ct. at 686-87 nn.1-4 and accompanying text.

57. 107 S. Ct. at 689 (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983) and *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)).

58. 107 S. Ct. at 689. See generally Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515 (1972); Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975).

59. 107 S. Ct. at 689 (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

60. 107 S. Ct. at 689 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

61. 107 S. Ct. at 689. See generally P. HAY & R. ROTUNDA, *THE UNITED STATES FEDERAL SYSTEM: LEGAL INTEGRATION IN THE AMERICAN EXPERIENCE*, 117-23 (1982).

62. 107 S. Ct. at 689.

63. *Id.* at 689-90. Section 708 of Title VII provides that nothing in Title VII exempts any person from compliance with or liability from any state laws "other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter." 42 U.S.C. § 2000e-7 (1982). The Court primarily refers to section 708 in determining the preemptive effect of Title VII. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 101, 103 (1983); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 423 n.18 (1975). Section 1104 of Title XI, applicable to all titles of the Civil Rights Act, provides in part that nothing in the Act should be interpreted as a congressional intent to occupy the field of employment discrimination, "nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act or any provision thereof." 42 U.S.C. § 2000h-4 (1982).

64. After discussing section 708 of Title VII, 42 U.S.C. § 2000e-7, the Court in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 103 (1983), stated, "Title VII does not itself prevent states from extending their nondiscrimination laws to areas not covered by Title VII . . . . Quite simply, Title VII is neutral on the subject of all employment practices it does not prohibit." (Citations omitted).

of equal employment opportunity.<sup>65</sup>

In order to make the determination of whether California's statute requires or permits employers to violate Title VII or is inconsistent with the purposes of Title VII and the PDA, the Court turned to the issue of "whether the PDA prohibits the States from requiring employers to provide reinstatement to pregnant workers, regardless of their policy for disabled workers generally."<sup>66</sup> Cal Fed argued that the PDA's second clause, which provides that "women affected by pregnancy . . . shall be treated the same for all employment related purposes" prohibits employers from treating pregnant employees differently than other disabled employees.<sup>67</sup> Examining the legislative history<sup>68</sup> and historical context of the PDA, the Court noted that the PDA's enactment stemmed from congressional reaction to *Gilbert*.<sup>69</sup> Rather than imposing a limitation on the PDA's remedial purpose, the Court believed that the PDA's second clause was intended to overrule the *Gilbert* holding and to illustrate how pregnancy discrimination is to be remedied.<sup>70</sup> The Court noted that Congress had reviewed extensive evidence of pregnancy discrimination,<sup>71</sup> but the preferential treatment of pregnancy had received minimal discussion. The Court reasoned that "if Congress had intended to *prohibit* preferential treatment, it would have been the height of understatement to say only that the legislation would not *require* such conduct."<sup>72</sup> The Court added that "[i]t is hardly conceivable that Congress would have extensively discussed only its intent not to require preferential treatment if in fact it had intended to prohibit such treatment."<sup>73</sup>

Cal Fed argued that even if section 12945(b)(2) does not require the preferential treatment of pregnancy, it permits such treatment by not specifically prohibiting preferential treatment. The Court responded that only state laws sanctioning practices unlawful under Title VII, rather than state laws which are merely silent on the practice, are pre-

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65. *Guerra*, 107 S. Ct. at 690 (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 101-02 (1983); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 468-69, 472, 477 (1982); and *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63-65 (1980)).

66. 107 S. Ct. at 691.

67. *Id.*

68. *See, e.g.*, 124 CONG. REC. 29,642 (1977) (Remarks of Sen. Bayh, a PDA co-sponsor).

69. 107 S. Ct. at 691.

70. *Id.* at 691. *See generally* Note, *Sexual Equality Under the Pregnancy Discrimination Act*, 83 COLUM. L. REV. 690 (1983) and Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L. J. 929 (1985).

71. 107 S. Ct. at 692.

72. *Id.* at 692-93.

73. *Id.* at 693.

empted.<sup>74</sup> The Court found it significant that Congress knew of state laws similar to California's and apparently found them consistent with the PDA.<sup>75</sup> Hence, the Court found that Congress had failed to evince the requisite "clear and manifest purpose" to preempt those state laws.<sup>76</sup>

The Court also found that the PDA and the California statute share a common goal—equal employment opportunities.<sup>77</sup> By requiring employers to reinstate women after a reasonable pregnancy leave, the California statute simply ensured that women would not lose their jobs because of pregnancy.<sup>78</sup> Concluding that Title VII, as amended by the PDA, does not preempt the California law,<sup>79</sup> the Court emphasized the limited nature of the benefits the California statute provides: the statute covers only actual physical disability periods caused by pregnancy.<sup>80</sup> By contrast, a statute based on archaic or stereotypical assumptions about pregnancy and the abilities of pregnant workers would be inconsistent with Title VII's goal of equal employment opportunity.<sup>81</sup>

The Court buttressed its reasoning by stating that "[s]ection 12945(b)(2) does not compel California employers to treat pregnant workers *better* than other disabled employees; it merely establishes benefits that employers must, at a minimum, provide to pregnant workers."<sup>82</sup> The Court asserted that "[e]mployers are free to give comparable benefits to other disabled employees, thereby treating 'women affected by pregnancy' no better than 'other persons not so affected but similar in their ability or inability to work.'"<sup>83</sup> Since compliance with

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74. *Id.* at 694 n.29.

75. *Id.* at 693 n.23 and accompanying text.

76. *Id.* at 693 (citing *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 206 (1983)). See also *Miller-Wohl Co. v. Commissioner of Labor and Indus. of Mont.*, 515 F. Supp. 1264 (D. Mont. 1981), *rev'd*, 685 F.2d 1088 (9th Cir. 1982).

77. 107 S. Ct. at 693-94. The seminal decision addressing Title VII's equal employment opportunity goal is *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-431 (1971). See also *Hishon v. King & Spaulding*, 467 U.S. 69, 75 n.7 (1984); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976). As to the California law, see *Price v. Civil Service Comm'n*, 26 Cal. 3d 257, 604 P.2d 1365 (1980) and *American National Ins. Co. v. Fair Employment & Housing Comm'n*, 32 Cal. 3d 603, 651 P.2d 1151 (1982).

78. 107 S. Ct. at 694.

79. *Id.* at 695.

80. CAL. GOV'T. CODE § 12945(b)(2) (West 1980).

81. 107 S. Ct. at 694. Cf. Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265 (1984) (suggesting that the Court itself engages in sexual stereotyping).

82. 107 S. Ct. at 695.

83. *Id.*

California's statute and with the PDA's mandate that pregnant and nonpregnant workers be treated alike is possible, no conflict exists between the California statute and the PDA.<sup>84</sup>

Justice Stevens, concurring in the *Guerra* judgment, relied upon *Steelworkers v. Weber*,<sup>85</sup> which drew a distinction between discrimination against members of a protected class and preferential treatment of class members, in finding that "the PDA's posture as part of Title VII compels rejection of [the] argument that the PDA mandates complete neutrality and forbids all beneficial treatment of pregnancy."<sup>86</sup> Justice Scalia also concurred in the judgment, stating that Title VII's "antipreemption" provision<sup>87</sup> controlled.<sup>88</sup> Justice White's dissent, joined by Chief Justice Rehnquist and Justice Powell, stated that the PDA's second clause "leaves no room for preferential treatment of pregnant workers."<sup>89</sup>

*Guerra's* significance rests on the future development of pregnancy antidiscrimination laws at the state level, not in the Court's preemption analysis, since the decision applied the standard preemption doctrine. Holding that Title VII does not preempt statutory schemes like California's,<sup>90</sup> the case may serve as a stepping stone to more state pregnancy antidiscrimination laws. In the United States, four states now provide pregnant workers with more protections than those generally afforded to other workers.<sup>91</sup> As noted previously, California makes it

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84. *Id.*

85. 443 U.S. 193 (1979).

86. 107 S. Ct. at 695-96 (Stevens, J., concurring).

87. 42 U.S.C. § 2000e-7 (1983) (Title VII's § 708).

88. 107 S. Ct. at 697 (Scalia, J., concurring).

89. *Id.* at 698 (White, J., dissenting, joined by Rehnquist, C.J., and Powell, J.).

90. CAL. GOV'T. CODE § 12945(b)(2) (West 1980).

91. CAL. GOV'T. CODE § 12945(b)(2) (West 1980); CONN. GEN. STAT. ANN. § 46a-60(a)(7) (West 1986); MASS. GEN. LAWS ANN. ch. 149, § 105D (West 1986 & Supp. 1987); MONT. CODE ANN. § 49-2-310 (1985). Four states, likewise, interpret their laws as requiring employers to grant reasonable pregnancy disability leaves. Hawaii Sex Discrimination Rules § 12-23-58; Ill. Commission Guidelines § 2.10, 56 ILL. ADMIN. CODE § 5210.110; N.H. Sex Discrimination Guidelines, HUM 402.03; Ohio Civil Rights Comm'n Rules § 4112-5-05(G)(2); Wash. Sex Discrimination Regulations, W.A.C. 162-30-020(5). Seven other states interpret their state laws as prohibiting inadequate leave policies that have a disparate impact on the basis of sex. Colo. Sex Discrimination Rules, Rule 80.8(c), *reprinted in* 8A FAIR EMP. PRAC. MAN. (BNA) 453:1128; Iowa Commission Rules, Rule 3.10, *reprinted in* 8A FAIR EMP. PRAC. MAN. (BNA) 453:3098; Kan. Commission Rules and Procedure, § 2132-6(c), *reprinted in* 8A FAIR EMP. PRAC. MAN. (BNA) 453-3311; Me. Commission Employment Regulations, § 3.06(F), *reprinted in* 8A FAIR EMP. PRAC. MAN. (BNA) 455:530; Mo. Code of State Regulation, Title 4, Div. 180, ch. 3 § 16(B), *reprinted in* 8A FAIR EMP. PRAC. MAN. (BNA) 455:1712; Okla. Commission Guidelines, V(1)(3), *reprinted in* 8A FAIR EMP. PRAC. MAN. (BNA) 457:555; and R.I. Sex Discrimination Guidelines, 7(b), *reprinted in* 8A FAIR EMP. PRAC. MAN. (BNA) 457:1276-77.

unlawful for employers to refuse reasonable leaves for pregnant employees, provided the leave does not exceed four months.<sup>92</sup> Connecticut makes it unlawful for an employer to terminate employment, refuse reasonable leave, and fail to reinstate employees because of pregnancy.<sup>93</sup> Massachusetts provides, by statute, that for a period not exceeding eight weeks, a woman may take a maternity leave and then return to her position with the same status, pay, tenure, and seniority.<sup>94</sup> Montana makes it unlawful for an employer to terminate a woman's employment because of her pregnancy or to refuse to grant a woman a reasonable maternity leave.<sup>95</sup>

The enactment by more states of such pregnancy antidiscrimination laws would further align the United States with the rest of the Western industrialized nations on the issue of pregnancy discrimination.<sup>96</sup> No drastic nor immediate additional measures will occur, but the removal of preemption by Title VII as an obstacle makes more state pregnancy antidiscrimination laws possible.

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92. CAL. GOV'T. CODE § 12945(b)(2) (West 1980).

93. CONN. GEN. STAT. ANN. § 46a-60(a)(7) (West 1986).

94. MASS. GEN. LAWS ANN. ch. 149, § 105D (West 1986 & Supp. 1987).

95. MONT. CODE ANN. § 49-2-310 (1985).

96. Seventy-five countries, including all industrialized countries except the United States, require some form of maternity leave or parental benefit by statute. Note, *Equality in the Workplace: Is That Enough for Pregnant Workers?*, 23 J. FAM. L. 401 (1984); S. KAMERMAN, A. KAHN & P. KINGSTON, *MATERNITY POLICIES AND WORKING WOMEN* 15 (1983). These foreign countries provide a minimum paid leave of twelve weeks with job security, pensions, and seniority all protected. *Id.* See Little, *Mother Load or Overload: The Need for a National Maternity Policy*, 17 N.Y.U. J. INT'L L. & POL. 717 (1985).

